GROUP COMPONENTS AUTOMOTIVE SDN BHD v. PERUSAHAAN OTOMOBIL NASIONAL SDN BHD

HIGH COURT MALAYA, SHAH ALAM
FAIZAH JAMALUDIN J
[CIVIL SUIT NO: BA-22NCvC-417-10-2020]
28 FEBRUARY 2022

Abstract – *Section 580A of the Companies Act 2016 ('CA') empowers the court to order security for costs where there is evidence to suggest that a plaintiff company may be unable to pay its debts to the defendant in the event the defendant successfully defends the claim against it by the plaintiff. When an exempt private company under the CA has failed to pay the judgment debt in a previous suit and is unable to pay the applicant's costs in the event the applicant is successful in its defence in a suit, the court ought to order the company to give security for costs.*

CIVIL PROCEDURE: *Costs – Security for costs – Application for – Preliminary objection – Whether applicant's non-statement of s. 580A of Companies Act 2016 in its notice of application prejudiced court's power to make order for security for costs – Whether applicant in non-compliance with any rules in Rules of Court 2012 – Whether there was substantial miscarriage of justice – Whether preliminary objection ought to be dismissed – Companies Act 2016, ss. 465(1)(e), 466(1)(a) – Rules of Court 2012, O. 2 r. 3 & O. 32 r. 1*

CIVIL PROCEDURE: *Costs – Security for costs – Application for – Whether company statutorily deemed under Companies Act 2016 to be unable to pay its debts – Whether there was high probability that applicant would not be able to recover costs of its defence from company – Whether court entitled to make order for security for costs – Companies Act 2016, ss. 465(1)(e), 466(1)(a) & 580A – Rules of Court 2012, O. 2 r. 3 & O. 32 r. 1*

This was an application by the defendant ('Proton') for security for costs against the plaintiff ('GCA') in the sum of RM150,000. In 2016, Proton had commenced proceedings against GCA and GCA had filed a counterclaim in the 2016 suit. GCA had made various admissions in the 2016 suit that it was facing financial constraints. The High Court ordered a consent judgment in the 2016 suit in favour of Proton and struck out GCA's counterclaim with liberty to file afresh. The Registrar assessed damages in favour of Proton, where GCA was found liable for damages in the sum of RM3,489,402.15. GCA has yet to pay Proton the damages awarded in the 2016 suit, despite Proton's various demands. It was Proton's case that there was a substantial risk and a high probability that if Proton was successful in its defence in this instant suit, Proton would not be able to recover the cost of its defence from

GCA. GCA raised a preliminary objection against Proton's application for security for costs, namely that Proton in its written submissions had principally relied on s. 580A of the Companies Act 2016 ('CA') to support its application for security for costs. GCA submitted that Proton could not rely on s. 580A of the CA since it had moved this court pursuant to O. 23 of the Rules of Court 2012 ('ROC') and not s. 580A of the CA. GCA argued that for this reason alone, Proton's application for security for costs should be dismissed *in limine.*

Held (order for security for costs):

(1) Section 580A of the CA 2016 empowers the court to order security for costs where there is evidence to suggest that a plaintiff company may be unable to pay its debts to the defendant in the event the defendant successfully defends the claim against it by the plaintiff. By virtue of O. 23 r. 3 of the ROC, Proton's non-statement of s. 580A of the CA in its notice of application does not prejudice this court's power to make an order for security for costs against GCA under the said law. (paras 10 & 11)

(2) Proton was not in non-compliance with any of the rules in the ROC by not stating in its notice of application that it was moving the court under s. 580A of the CA 2016. This was because the application for security for costs was made pursuant to a notice of application under O. 32 r. 1 of the ROC, which states that every application in chambers shall be made by notice of application in Form 57. Unlike an application made by way of an originating summons, there was no requirement in O. 32 or in Form 57 of the ROC that a notice of application must state in its title or intitulement the rules of the ROC and the written law under which the court was being moved. (paras 12 & 13)

(3) Order 2 r. 3 of the ROC expressly states that a preliminary objection for non-compliance of the ROC is not allowed unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice or prejudice that cannot be cured either by amendment or an appropriate order for costs or both. Proton's non-statement in its notice of application that it was making the application for security for costs pursuant to s. 580A of the CA, had not occasioned a substantial miscarriage of justice or prejudice to GCA. Proton's prayer in its notice of application, which prayed for 'such further or other orders or directions deemed proper and appropriate by this Honourable Court' entitled this court to make an order for security for costs. GCA's preliminary objection was therefore dismissed. (paras 14-17)

(4) GCA has yet to make payment for the assessed damages in the 2016 suit in the sum of RM3,489,402.15 and had not answered Proton's letter of demand for the damages. Proton had issued GCA a statutory demand pursuant to ss. 465(1)(e) and 466(1)(a) of the CA. GCA has, to date, neglected to pay the sum demanded under the statutory notice. Therefore, pursuant to s. 466(1)(a) of the CA, GCA was statutorily deemed to be unable to pay its debts. Furthermore, GCA averred on affidavit in its stay application filed in the 2016 suit that its bank account with CIMB showed an available balance of RM13,754.14 and its bank account with Bank Islam showed an available balance of RM24,607.56. The aggregate balance in both accounts was nowhere near sufficient to pay its judgment debt of RM3,489,402.15 in the 2016 suit or any costs awarded against GCA if Proton was successful in its defence. (paras 30-33)

(5) Based on the SSM Practice Direction, GCA as an exempt private company would not have sufficient revenue and assets to pay the judgment debt of RM3,489,402.15 from the 2016 suit and any costs awarded against it in this instant suit. The SSM search results also show that GCA has an undischarged charge by Malaysian Industrial Development Berhad for the sum of RM860,000 and another undischarged charge by Perbadanan Usahawan Nasional Berhad for the sum of RM405,000. Thus, this court found that (i) GCA had failed, refused and/or neglected to pay the judgment debt in the 2016 suit; (ii) GCA was statutorily deemed under the CA to be unable to pay its debts; (iii) GCA was an exempt private company under the CA; and (iv) the amount of monies in GCA's bank accounts amounted to credible testimony that GCA would be unable to pay Proton's costs in the event Proton was successful in its defence in this instant suit. Accordingly, this court hereby ordered GCA to give security for costs within 30 days from the date of this order. (paras 37, 38, 42 & 43)

Case(s) referred to:
Lim Eng Kay v. Jaafar Mohamed Said [1982] CLJ 298; [1982] CLJ (Rep) 190 FC ***(refd)***
Mas Anita Abdullah v. Lew Wai Koung [2013] 3 CLJ 737 HC ***(refd)***
Stamford College Bhd v. Iris Corporation Bhd [2013] 1 LNS 602 HC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 351
Companies Act 2016, ss. 465(1)(e), 466(1)(a), 580A
Evidence Act 1950, s. 57
Rules of Court 2012, O. 2 r. 3, O. 23 rr. 1, 2, 3, O. 32 r. 1, O. 92 r. 4

For the plaintiff - Lavendran Masilamany & Esther Tamil Chelevam; M/s Peter Chambers
For the defendant - K Shanti Mogan & Hee Hui Ting; M/s Shearn Delamore & Co

Reported by Suhainah Wahiduddin

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JUDGMENT
(encl. 10)

Faizah Jamaludin J:

Introduction

B **[1]** This is an application by the defendant ("Proton") for security for costs against the plaintiff ("GCA") in the sum of RM150,000.

[2] The reasons for the Proton's application for security for costs are as follows:

C (i) In 2016, Proton had commenced proceedings against GCA, Kejuruteraan Emas Sdn Bhd ("KE") and Jefloy Sdn Bhd ("Jefloy") in the Shah Alam High Court Suit No. BA-22NCVC-141-03-2016 ("2016 suit"). GCA had filed a counterclaim in the 2016 suit;

(ii) GCA had made various admissions in the 2016 suit that it is facing
D financial constraints;

(iii) On 25 January 2017, the Shah Alam High Court recorded a consent judgment in the 2016 suit in favour of Proton and struck out GCA's counterclaim with liberty to file afresh;

E (iv) On 28 February 2020, the Registrar assessed damages in favour of Proton, where GCA and KE were found liable for damages in the sum of RM3,489,402.15;

(v) GCA has yet to pay Proton the damages awarded in the 2016 suit, despite Proton's various demands; and

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(vi) GCA's financial condition is unknown since the SSM company search shows that GCA is an exempt private company as at 31 December 2014. As an exempt private company, GCA's financial status is not reported in the SSM company search.

G **[3]** It is Proton's case that there is a substantial risk and a high probability that if Proton is successful in its defence in this instant suit, Proton will not be able to recover the cost of its defence from GCA. This is because GCA had admitted in the 2016 suit that it is facing financial constraints and it has repeatedly demonstrated its inability to pay Proton the judgment sum of
H RM3,489,402.15 ordered against it in the 2016 suit.

GCA's Preliminary Objection

[4] GCA had raised a preliminary objection against Proton's application for security for costs, namely that Proton in its written submissions had principally relied on s. 580A of the Companies Act 2016 ("CA 2016") to
I support its application for security for costs.

[5] GCA submits that Proton cannot rely on s. 580A of the CA 2016 since it had moved this court pursuant O. 23 of the Rules of Court 2012 ("ROC") and not s. 580A of the CA 2016.

[6] Learned counsel for GCA argues that for this reason alone, Proton's application for security for costs should be dismissed *in limine*.

Decision Of This Court As Regards GCA's Preliminary Objection

[7] Proton in its notice of application (encl. 10) stated that its application for security for costs was made pursuant to O. 23 and/or O. 92 r. 4 of the ROC and/or this court's inherent jurisdiction. It did not expressly state that it made the application pursuant to s. 580A of the CA 2016.

[8] The issue at hand is whether this court should dismiss Proton's application for security for costs *in limine* because it did not state that the application was made pursuant to s. 580A of the CA 2016.

[9] Order 23 of the ROC comprises of three rules:

(i) Rule 1 of O. 23 specifies four instances where the court may, if having regard to all the circumstance of the case, thinks it is just to order the plaintiff to give such security for the defendant's costs of the action or other proceedings.

(ii) Rule 2 of O. 23 specifies the manner of giving the security:

> 2. Manner of giving security
>
> Where an order is made requiring any party to give security for costs, the security shall be given in such manner, at such time, and on such terms, if any, as the court may direct.

(iii) Rule 3 of O. 23 is the saving provision for any written law:

> 3. Saving for written law
>
> This Order is without prejudice to the provisions of any written law which empowers the court to require security to be given for the costs of any proceedings.

[10] Section 580A of the CA 2016 empowers the court to order security for costs where there is evidence to suggest that a plaintiff company may be unable to pay its debts to the defendant in the event the defendant successfully defends the claim against it by the plaintiff. Section 580A of the CA 2016 was introduced by the Companies (Amendment) Act 2019 (Act A1065). It is *pari materia* with s. 351 of the repealed Companies Act 1965.

[11] By virtue of O. 23 r. 3 of the ROC, Proton's non-statement of s. 580A of the CA 2016 in its notice of application does not prejudice this court's power to make an order for security for costs against GCA under the said law.

[12] Furthermore, Proton was not in non-compliance with any of the rules in the ROC by not stating in its notice of application that it is moving the court under s. 580A of the CA 2016. This is because the application for security for costs was made pursuant to a notice of application under O. 32 r. 1 of the ROC, which states that every application in chambers shall be made by notice of application in Form 57.

[13] Unlike an application made by way of an originating summons, there is no requirement in O. 32 or in Form 57 of the ROC that a notice of application must state in its title or intitulement the rules of the ROC and the written law under which the court is being moved.

[14] Even if Proton was in non-compliance with any of the rules, O. 2 r. 3 of the ROC expressly states that a preliminary objection for non-compliance of the ROC is not allowed unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice or prejudice that cannot be cured either by amendment or an appropriate order for costs or both. Order 2 r. 3 states:

> A court or Judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any provision of these Rules unless the court or Judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice or occasioned prejudice that cannot be cured either by amendment or an appropriate order for costs or both.

[15] I do not find that in this instant case, Proton's non-statement in its notice of application that it was making the application for security for costs pursuant to s. 580A of the CA 2016, had occasioned a substantial miscarriage of justice or prejudice to GCA. In fact, learned counsel for GCA in raising the preliminary objection did not submit that Proton's failure to state s. 580A of the CA 2016 in its notice of application had caused a substantial miscarriage of justice or prejudice to GCA.

[16] Additionally, in *Lim Eng Kay v. Jaafar Mohamed Said* [1982] CLJ 298; [1982] CLJ (Rep) 190; [1982] 2 MLJ 156 at p. 198, the Federal Court held that the prayer "any other relief which this Honourable Court deems fit to grant" "must not be treated as a mere ornament of pleadings devoid of meaning". Thus, in this instant case, the prayer in item 6 of Proton's notice of application in encl. 10, which prays for "such further or other orders or directions deemed proper and appropriate by this Honourable Court", entitles this court to make an order for security for costs.

[17] For these reasons, GCA's preliminary objection is dismissed.

Analysis And Findings Of This Court In Respect Of Proton's Application For Security For Costs

[18] Section 580A of the CA 2016 reads as follows:

> **Security for Costs**
>
> (1) Where a company is the plaintiff in any action or other proceedings and **if it appears by a credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if the defendant is successful in his defence**, the court may order the plaintiff to give sufficient security for all the costs and to stay all action or proceedings until the security is given.
>
> (2) The court may direct the costs of any action or proceedings to be borne by the party to the action or proceedings.
>
> (emphasis added)

[19] The test for this court in deciding whether or not to use its discretion to order the plaintiff to give sufficient security for costs is "if it appears by a credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if the defendant is successful in his defence".

[20] In determining whether there is a "credible testimony" that GCA will be unable to pay Proton's costs for these proceedings if Proton succeeds in its defence, it is necessary to consider the facts and the circumstances leading up to the 2016 suit, the consent judgment, the damages awarded against GCA in the 2016 suit and this instant action.

Is There Credible Testimony That GCA Will Be Unable To Pay Proton's Costs In The Event Proton Is Successful In Its Defence In This Instant Suit?

[21] In 2011, Proton appointed GCA as its parts supplier pursuant to a parts purchase agreement dated 1 May 2011 ("PPA"). Under the PPA, GCA agreed to manufacture and supply vehicle parts to Proton.

[22] To enable GCA to manufacture the parts, Proton entered into a tools provisioning agreement ("TPA") with GCA in 2014. The TPA sets out GCA's obligations to develop toolings, *ie*, dies, moulds, jigs, assembly tools and fixtures ("toolings") that are specific for the purpose of making parts of Proton vehicles.

[23] Proton paid GCA the sum of RM1,176.521.69 for the toolings. The TPA states that the ownership of the toolings vests with Proton.

[24] Without Proton's knowledge or consent, GCA and/or KE caused the toolings to be transferred to Jefloy, pursuant to a sale and purchase agreement dated 5 May 2015 ("SPA") between KE and Jefloy. Subsequent to the SPA, GCA informed Proton that it intended to exit the business. GCA admitted to financial difficulties as a reason for the exit. Proton did not consent to the exit.

[25] In August 2015, Proton discovered that GCA had transferred and sold the toolings to Jefloy. GCA ignored Proton's warning that GCA had no authority to transfer the toolings to Jefloy.

[26] Proton filed the 2016 suit against GCA, KE and Jefloy for the return of the toolings.

[27] The outcome of the 2016 suit was as follows:

(i) Proton obtained an injunction to compel the return of the toolings;

(ii) The parties entered into a consent judgment dated 25 January 2017 where the defendants' liability was established, with damages to be assessed. GCA's counterclaim against Proton was struck out with liberty to file afresh; and

(iii) On 28 February 2020, the Registrar assessed damages in the sum of RM3,489,402.15 to be paid to Proton, by reason of the unauthorised transfer of the toolings, which had resulted in Proton being unable to have parts supplied to it to complete the manufacture of the Proton brand vehicles. The toolings were required to manufacture the parts of the Proton brand vehicles.

[28] To date, despite Proton's numerous demands, GCA has not paid Proton the assessed damages in the 2016 suit. In November 2020, GCA filed this instant suit against Proton making the same claims as in its counterclaim to the 2016 suit.

[29] The affidavit evidence shows that in June 2015, when GCA wanted to stop supplying parts to Proton and suggested its exit as a vendor, GCA informed Proton that it was in financial difficulties. The presentation slides dated 18 May 2015 when GCA presented its exit plan to Proton (at pp. 69 of exh. MMN-5 of Proton's afidavit sokongan) shows:

> Difficulty in managing the financial constraint dues to the business downturn, with Proton, we therefore GCA decide to exit as vendor to Proton as we cannot sustain the capital investment made.

[30] GCA has yet to make payment for the assessed damages in the 2016 suit in the sum of RM3,489,402.15. GCA has not answered Proton's letter of demand for the damages dated 16 May 2020.

[31] Proton had, through its solicitors, issued GCA a statutory demand dated 18 May 2020 pursuant to ss. 465(1)(e) and 466(1)(a) of the CA 2016 (at pp. 224 of exh. MMN-12 of Proton's afidavit sokongan).

[32] GCA has to date neglected to pay the sum demanded under the statutory notice. Therefore, pursuant to s. 466(1)(a) of the CA 2016, GCA is statutorily deemed to be unable to pay its debts. Section 466(1)(a) of the CA 2016 expressly states that:

(1) A company shall be deemed to be unable to pay its debts if (a) ... the company has for twenty-one days after the service of the demand neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor.

[33] Furthermore, GCA averred on affidavit in its stay application filed in the 2016 suit that its bank account with CIMB shows an available balance as at 29 February 2020 of RM13,754.14 and its bank account with Bank Islam shows an available balance as at 31 January 2020 of RM24,607.56. The aggregate balance in both accounts is nowhere near sufficient to pay its judgment debt of RM3,489,402.15 in the 2016 suit or any costs awarded against GCA if Proton is successful in its defence.

[34] Additionally, the SSM search results on GCA exhibited at pp. 260 to 265 of exh. MM13 of Proton's afidavit sokongan, shows that GCA is an "exempt private company" since 31 December 2014.

[35] The practice direction issued by the SSM dated 2 August 2017 on "exempt private companies" ("SSM practice direction") state that exempt private companies are exempted from having to appoint an auditor to audit its financial statements. The SSM practice direction states:

In this regard, the following categories of private companies are exempted from the audit requirement:

(a) Dormant companies;

(b) Zero-Revenue companies; and

(c) Threshold-Qualified companies.

A dormant company qualifies for audit exemption if it has been dormant from the time of its incorporation; or it is dormant throughout the current financial year and in the immediate preceding financial year.

A zero-revenue company is qualified for audit exemption if it does not have any revenue during the current financial year; it does not have any revenue in the immediate past two financial years; and its total assets in the current Statement of Financial Position (FS) does not exceed RM300,000 as well as in the FS of the immediate past two financial years.

A threshold-qualified company is qualified for an audit exemption if it fulfils the following criteria:

(a) It has revenue not exceeding RM100,000 during the current financial year and in the immediate past two financial years;

(b) Its total assets in the current Statement of Financial Position does not exceed RM300,000 and in the immediate past two financial years; and

(c) It has, at the end of its current financial year and in each of its immediate past two financial years' end, not more than five employees.

[36] This court may take judicial notice of the SSM practice direction on exempt private companies under s. 57 of the Evidence Act 1950. Based the SSM practice direction, as an exempt private company, GCA must be:

(i) a dormant company; or

(ii) a zero-revenue company *ie*, it does not have any revenue during the current financial year, it does not have any revenue in the immediate past two financial years, and its total assets in the current statement of financial position (FS) does not exceed RM300,000 as well as in the FS of the immediate past two financial years; or

(iii) a threshold-qualified company, *ie*, its revenue does not exceed RM100,000 during the current financial year and in the immediate past two financial years, its total assets in the current FS does not exceed RM300,000 as well as in the FS of the immediate past two financial years, and it has, at the end of its current financial year and in each of its immediate past two financial years' end, not more than five employees.

[37] It is not evident from the affidavits whether GCA qualified as an exempt private company, by being a dormant company, or a zero-revenue company, or a threshold-qualified company. What is evident is that based on the SSM practice direction, GCA as an exempt private company would not have sufficient revenue and assets to pay the judgment debt of RM3,489,402.15 from the 2016 suit and any costs awarded against it in this instant suit.

[38] The SSM search results also show that GCA has an undischarged charge by Malaysian Industrial Development Berhad for the sum of RM860,000 and another undischarged charge by Perbadanan Usahawan Nasional Berhad for the sum of RM405,000.

[39] In its written submission, Proton had cited as authority in support of its application for security for costs the cases of *Mas Anita Abdullah v. Lew Wai Koung* [2013] 3 CLJ 737; [2013] 8 MLJ 698 and *Stamford College Bhd v. Iris Corporation Bhd* [2013] 1 LNS 602; [2014] 8 MLJ 178.

[40] In *Mas Anita*, Yeoh Wee Siam J (as she then was) held that the fact the plaintiff in that case still fails, refuses and/or neglects to pay a judgment sum obtained by the defendant in a previous suit, at the time of the defendant is applying for security for costs in a current suit by the plaintiff against the defendant, is sufficient to show that "the plaintiff is capable of not paying costs to the defendant should the plaintiff's claim be later dismissed by the court and costs be ordered against the plaintiff."

[41] In *Stamford College*, the High Court held that the defendant only needs to show some proof to assert security is needed from the plaintiff. Abu Bakar Jais JC (as he then was) held that the plaintiff's impecuniosity was credible testimony that the plaintiff will be unable to pay the defendant's costs if the defendant is successful in its defence. The court also held that the plaintiff's allegation that it was in its current financial position because of the defendant's failure to honour the agreement between them was the subject matter of the trial – it was not relevant in the defendant's application for security for costs.

[42] In this instant case, I find the fact that:

(i) GCA has failed, refused and/or neglected to pay the judgment debt in the 2016 suit;

(ii) GCA is statutorily deemed under the CA 2016 to be unable to pay its debts;

(iii) GCA is an exempt private company under the CA 2016; and

(iv) the amount of monies in GCA's bank accounts, amounts to credible testimony that GCA will be unable to pay Proton's costs in the event Proton is successful in its defence in this instant suit.

Decision

[43] Accordingly, for the reasons above, this court hereby orders GCA to give security for costs in the sum of RM100,00 within 30 days from the date of this order.

[44] It is further ordered that all proceedings in this instant suit is stayed until the said security for costs is given.

[45] In the event GCA fails or refuses to give the security for costs as ordered, GCA's claim against Proton in this action shall be struck out and dismissed with costs.